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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE JUAREZ,

Petitioner,

v.

W.L. MONTGOMERY, Warden,

Respondent.

CASE NO. CV 18-06562-AS

MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

On July 30, 2018, Jose Juarez ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. (Dkt. No. 1). On October 19, 2018, Respondent filed an Answer with an accompanying Memorandum of Points and Authorities. ("Ans. Mem.," Dkt. No. 10). Respondent also lodged documents from Petitioner's state proceedings, including the Clerk's Transcript ("CT") and Reporter's Transcript ("RT"). (Dkt. No. 11). On October 22, 2018, the Court issued an order advising Petitioner that he could file a

1 reply by November 19, 2018. (Dkt. No. 12). Petitioner has not
2 done so.

3
4 The parties consented, pursuant to 28 U.S.C. § 636(c), to the
5 jurisdiction of the undersigned United States Magistrate Judge.
6 (Dkt. Nos. 2, 9, 13). For the reasons discussed below, the Petition
7 is DENIED and this action is DISMISSED with prejudice.

8
9 **II. PRIOR PROCEEDINGS**

10
11 On March 19, 2015, after a joint jury trial with co-defendant
12 Carlos Omar Sanchez, a Los Angeles County Superior Court jury found
13 Petitioner guilty of second degree robbery in violation of
14 California Penal Code ("P.C.") § 211 and evading a police officer
15 in violation of California Vehicle Code § 2800.2(a). (CT 194-95,
16 203-04). The jury also found true the allegation that Petitioner
17 used a firearm to commit the robbery, within the meaning of P.C.
18 12022.53(b). (CT 194). On April 21, 2015, the court sentenced
19 Petitioner to nineteen years in state prison. (CT 266-71).

20
21 Petitioner and his co-defendant appealed their convictions to
22 the California Court of Appeal, which issued an unpublished opinion
23 on February 2, 2015 affirming the judgment, but ordering that a
24 twenty dollar DNA assessment be stricken and Petitioner be awarded
25 376 days of presentence custody credit. (Lodgment No. 8).
26 Petitioner filed a petition for review in the California Supreme
27 Court (Lodgment No. 9), which summarily denied the petition on May
28 17, 2017. (Lodgment No. 11).

1 On February 13, 2018, Petitioner filed a habeas petition in
2 Los Angeles County Superior Court, which the court denied on March
3 2, 2018, because it raised claims that had already been raised and
4 denied on appeal. (Lodgment Nos. 12-13). On April 13, 2018,
5 Petitioner filed a habeas petition in the California Supreme Court,
6 which was summarily denied on July 11, 2018. (Lodgment Nos. 14-
7 15). The instant Petition was filed in this Court on July 30,
8 2018.

9 10 **III. FACTUAL BACKGROUND**

11
12 The California Court of Appeal reviewed Petitioner's claims
13 on appeal together with the claims of co-defendant Sanchez. The
14 following facts, taken from the California Court of Appeal's
15 decision on direct review, have not been rebutted with clear and
16 convincing evidence and must be presumed correct. 28 U.S.C.
17 § 2254(e)(1); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir.
18 2009).

19
20 In the early morning hours of May 30, 2014, Arnulfo
21 Robles was riding his bicycle on a sidewalk in Whittier,
22 California. A motorcycle drove up from behind and
23 partially blocked Robles's path. There were two people
24 on the motorcycle. The driver said, "Give me your phone."
25 When Robles refused, the driver lifted up the back of
26 his shirt to reveal a handgun, put his fingers around
27 the gun's grip, and warned, "Don't make me." The
28 passenger then added, "Hurry up and give him your phone."

1 Robles obliged, handing the phone to the passenger. The
2 motorcycle then sped away.

3
4 The entire encounter lasted about a minute.
5 Although both the driver and passenger were wearing
6 helmets, the helmets did not cover their eyes or noses,
7 and they had stopped "almost directly" under a
8 streetlight. Robles estimated that he looked at the
9 driver's face for approximately 10 to 15 seconds and at
10 the passenger's face for approximately four to six
11 seconds. He could not tell what race they were. Robles
12 said the driver was wearing a white shirt, blue jeans,
13 and had on a black helmet. Robles said the passenger was
14 wearing a gray sweater and had on a black helmet; Robles
15 did not notice any writing on the sweater.

16
17 After the motorcycle pulled away, Robles continued
18 to a friend's house and, once there, called 911. He
19 reported the robbery and told the 911 operator that the
20 passenger looked to be 12 or 13 years old based on his
21 stature on the motorcycle. Robles also activated the
22 "find my iPhone" function on his phone.

23
24 The police dispatcher broadcast a description of
25 the motorcycle involved in the robbery, and a patrol car
26 soon thereafter spotted a motorcycle matching that
27 description. The officers in that car activated their
28 lights and sirens. The motorcycle's driver then led them

1 on a high-speed chase during which time the motorcycle
2 jumped on and off various freeways, sped more than 90
3 miles per hour, ran red lights and signals, and crossed
4 multiple lanes of traffic without looking. Both officers
5 were able to see that the driver was wearing a light-
6 colored shirt, blue jeans, and unlike Robles reported,
7 a white helmet; they saw the passenger wearing a gray
8 top and a black helmet.

9
10 Police helicopters assisted with the pursuit. The
11 observer in the first helicopter saw the driver wearing
12 a white shirt, blue pants, and like the officers but
13 unlike Robles reported, a white helmet, and the
14 passenger wearing "like a gray shirt" and a black or
15 dark-colored helmet. The observer in the second
16 helicopter watched the motorcycle disappear under a
17 freeway underpass and continue on with just the driver.
18 Thereafter, the observer saw the driver leave the
19 motorcycle and disappear into a neighborhood on foot.

20
21 Within five to ten minutes of losing sight of the
22 motorcycle's occupants, police got word that Robles's
23 iPhone was pinging from a house on South Concord Street.
24 The house was just 1.4 miles from the location of the
25 robbery. On a walkway right outside the house, police
26 discovered an abandoned motorcycle and helmet. Less than
27 25 minutes later, several police officers entered the
28 two-story house. The house was known to be inhabited by

1 squatters, and police found seven men - all in their
2 late teens, 20s, and 80s - inside. [Petitioner] was
3 hiding beneath insulation in the house's crawl-space
4 attic, next to a bandana filled with live .38-caliber
5 rounds. He was wearing black shorts and a black shirt.
6 Sanchez was laying behind a couch on the first floor. He
7 was wearing a gray sweatshirt with the letters "CALI" on
8 the chest. Police found Robles's pinging iPhone in the
9 second-floor bedroom; in the same bedroom, they
10 recovered a pair of jeans and two shirts, one of which
11 was a gray shirt with writing on the chest and left
12 sleeve (in the same size as the gray sweatshirt with the
13 letters "CALI"). Police also recovered a motorcycle
14 helmet inside the house.

15
16 The police transported Robles in a police cruiser
17 to a location two to three houses down from the house
18 where they found his iPhone. They told Robles they had
19 recovered his iPhone and brought him down "to look at
20 who we caught ... who we arrested." Police then marched
21 [Petitioner], Sanchez, and at least two of the house's
22 other occupants into the street, one at a time, for
23 approximately 30 seconds. Police did not ask any of those
24 men to put on a helmet or to sit atop a motorcycle.
25 Robles identified [Petitioner] as the driver and Sanchez
26 as the passenger. Robles did not identify Sanchez based
27 on his face, but rather because he "recognized" "his
28 body, his buil[d]" and recognized the gray shirt.

1 Sanchez is five feet four inches tall. After Robles made
2 his identifications, the police said, "Good job, thank
3 you, things like that." Although Robles freely admitted
4 that he was brought to the house "to identify or look at
5 the people who had taken [his] phone" and was expecting
6 to find the robbers, Robles explained that he was not
7 going to "just identify anyone," and he did not identify
8 any of the other people he was shown as being involved
9 in the robbery.

10
11 (Lodgment No. 8 at 2-5).

12
13 **IV. PETITIONER'S CLAIMS**

14
15 Petitioner raises the following claims for federal habeas
16 relief:

17
18 Ground One: Petitioner's trial counsel rendered ineffective
19 assistance by failing to move to suppress Robles's
20 field identification based on the loss of evidence.

21
22 Ground Two: The trial court erred by failing to instruct the
23 jury to begin deliberating anew after an alternate
24 juror was seated.

25
26 (Petition at 5, 9).

V. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, 562 U.S. 86, 98 (2011). Under AEDPA's deferential standard, a federal court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law or was based upon an unreasonable determination of the facts. 28 U.S.C. § 2254(d). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations omitted).

Petitioner raised Ground One in his petition on direct review in the California Supreme Court (Lodgment No. 9), and he later raised Grounds One and Two in his habeas petition in the California Supreme Court. (Lodgment No. 14). Both petitions were denied without comment or citation to authority. (Lodgment Nos. 11, 15). The Court "looks through" the California Supreme Court's silent denial to the last reasoned decision as the basis for the state court's judgment. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."); Cannedy v. Adams, 706 F.3d 1148, 1159, as amended, 733 F.3d 794 (9th Cir.

2013) (“[W]e conclude that Richter does not change our practice of ‘looking through’ summary denials to the last reasoned decision - whether those denials are on the merits or denials of discretionary review.”) (footnote omitted). Therefore, the Court will consider the Court of Appeal’s reasoned opinion addressing Grounds One and Two on direct review. Berghuis v. Thompkins, 560 U.S. 370, 380 (2010); see also Gonzalez v. Brown, 585 F.3d 1202, 1206 (9th Cir. 2009) (federal habeas courts “apply AEDPA deference to any state court decision on the merits”).

VI. DISCUSSION

A. Ineffective Assistance of Counsel (Ground One)

In Ground One, Petitioner claims that his trial counsel was ineffective by failing to move to suppress the field identification of the witness, Robles, due to the loss of evidence.¹ (Petition at 5, 9).

1. California Court of Appeal’s Opinion

The California Court of Appeal denied Petitioner’s ineffective assistance of counsel claim, stating:

¹ On direct appeal in the California Court of Appeal and the California Supreme Court, Petitioner additionally argued that his trial counsel was ineffective for not moving to suppress the identification as unconstitutionally suggestive. (Lodgment Nos. 3, 9). His Petition here, however, does not mention this basis.

1 Police officers filled out field identification
2 cards on the five people other than [Petitioner] and
3 Sanchez found inside the South Concord Street house
4 along with Robles's iPhone. At some point thereafter,
5 they lost those cards. [Petitioner and Sanchez] argue
6 that this error makes it impossible for them to identify
7 the other inhabitants of the South Concord Street house
8 and to reconstruct the showup procedure at which Robles
9 identified [Petitioner] and Sanchez, and violates due
10 process because it constitutes either (1) the
11 suppression of material evidence, in violation of Brady
12 v. Maryland (1963) 373 U.S. 83 (Brady), or (2) the
13 destruction of material evidence, in violation of
14 California v. Trombetta (1984) 467 U.S. 479 (Trombetta).
15

16 The police's failure to preserve the field
17 identification cards does not violate Brady. Under
18 Brady, prosecutors have a duty not to suppress evidence
19 that is favorable to the defense and material if that
20 evidence is in their possession. (People v. Masters
21 (2016) 62 Cal.4th 1019, 1066-1067.) Here, the field
22 identification cards were lost; they were accordingly
23 not in the possession of either the prosecutor or the
24 investigating agency. This is fatal to any Brady claim.
25 (People v. Lucas (2014) 60 Cal.4th 153, 221 (Lucas)
26 "[t]he constitutional due process rights of a defendant
27 may be implicated when he or she is denied access to
28 favorable evidence in the prosecution's possession,"

1 italics added], overruled on other grounds in People v.
2 Romero and Self (2015) 62 Cal.4th 1; People v. Whalen
3 (2013) 56 Cal.4th 1, 64 [Brady mandates disclosure of
4 evidence in the prosecution team's "possession"].)³

5
6 [Fn. 3] We accordingly have no occasion to decide
7 whether the field identification cards are either
8 favorable to the defense or material.

9
10 The police's failure to preserve the field
11 identification cards also does not violate Trombetta.
12 Trombetta applies when the state "fail[s] to preserve
13 evidence." (Lucas, supra, 60 Cal.4th at p. 221.)
14 Trombetta and its follow-on case, Arizona v. Youngblood
15 (1988) 488 U.S. 51, place two duties on police agencies
16 with regard to preserving evidence: If the evidence has
17 "apparent" "exculpatory value" and cannot be obtained
18 "'by other reasonably available means,'" its destruction
19 violates due process; however, if the evidence might be
20 useful to the defense but does not have "apparent"
21 "exculpatory value," its destruction violates due
22 process only if the police act in bad faith. (People v.
23 Carrasco (2014) 59 Cal.4th 924, 961-962; People v.
24 DePriest (2007) 42 Cal.4th 1, 41-42.) The names and
25 contact information of the five other people inside the
26 South Concord Street house does not have "apparent"
27 "exculpatory value" because it is unclear whether
28 reconstructing the showup with them would undermine or

1 confirm Robles's positive identifications of
2 [Petitioner] and Sanchez. Moreover, there is no evidence
3 that the police acted in bad faith in losing the field
4 identification cards. Thus, [Petitioner and Sanchez]
5 cannot meet the pertinent standards for relief under
6 Trombetta and its progeny.

7
8 [Petitioner and Sanchez] point us to two groups of
9 cases, suggesting that they establish that the loss of
10 the field identification cards is enough by itself to
11 warrant suppression of all of Robles's identifications.
12 First, they cite People v. Ratliff (1986) 41 Cal. 3d 675
13 and People v. Posten (1980) 108 Cal.App.3d 633. To be
14 sure, both of these cases indicate that the destruction
15 of evidence relating to an out-of-court identification
16 by itself warrants suppression of that identification.
17 (Ratliff, at p. 690; Posten, at pp. 646-647.) But both
18 of these cases cite People v. Hitch (1974) 12 Cal. 3d
19 641 as support for their rule. (Ratliff, at p. 690;
20 Posten, at p. 646.) Our Supreme Court has subsequently
21 held that "Hitch ... has not survived Trombetta."
22 (People v. Johnson (1989) 47 Cal.3d 1194, 1234.)
23 Consequently, the Hitch-based rule in Ratliff and Posten
24 is no longer good law. Second, [Petitioner and Sanchez]
25 point us to three federal decisions that are at least 45
26 years old. (See United States v. Augello (2d Cir. 1971)
27 451 F.2d 1167; United States v. Bryant (D.C. Cir. 1971)
28 448 F.2d 1182; United States v. Heath (9th Cir. 1958)

1 260 F.2d 623.) They do not apply the pertinent legal
2 standard announced in Trombetta and are, for that reason
3 alone, irrelevant.

4
5 (Lodgment No. 8 at 10-13).

6
7 **2. Analysis**

8
9 To succeed on a Sixth Amendment ineffective assistance of
10 trial counsel claim, a petitioner must demonstrate both that
11 counsel's performance was deficient and that the deficient
12 performance prejudiced the defense. Strickland v. Washington, 466
13 U.S. 668, 687 (1984). The petitioner bears the burden of
14 establishing both components. Williams v. Taylor, 529 U.S. 362,
15 390-91 (2000); Strickland, 466 U.S. at 687. "To establish
16 deficient performance, a person challenging a conviction must show
17 that counsel's representation fell below an objective standard of
18 reasonableness." Richter, 562 U.S. at 104 (citation omitted).
19 Prejudice "focuses on the question whether counsel's deficient
20 performance renders the results of the trial unreliable or the
21 proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S.
22 364, 372 (1993); accord Williams, 529 U.S. at 393 n.17. That is,
23 a petitioner must establish that there is a "reasonable probability
24 that, but for counsel's unprofessional errors, the result of the
25 proceeding would have been different," Strickland, 466 U.S. at 694,
26 and "[t]he likelihood of a different result must be substantial,
27 not just conceivable," Richter, 562 U.S. at 112. Thus, counsel's
28 errors must be "so serious as to deprive the defendant of a fair

1 trial, a trial whose result is reliable." Strickland, 466 U.S. at
2 687.

3
4 Here, Petitioner claims that his trial counsel provided
5 ineffective assistance by failing to move to suppress the victim's
6 field identification of Petitioner. (Petition at 5, 9).
7 Petitioner argues that the identification evidence should have been
8 suppressed because the officers lost the identities of the other
9 individuals present during the identification, and "neither the
10 officers nor the victim could recall critical details of the
11 procedures employed." (Id. at 9).

12
13 The field identification at issue took place by the house
14 where the officers had located the apparent robbery suspects and
15 the phone that had been taken from victim Robles. Robles testified
16 that officers took him to the location about four hours after the
17 robbery incident. (CT 17). At the preliminary hearing, he stated
18 that he was presented with three or four possible suspects,
19 including Petitioner and his co-defendant, Sanchez, but Robles
20 could not remember the order in which they were presented. (CT
21 18). At trial, he testified that he thought he was shown a total
22 of five people. (5 RT 2421). He testified that they were shown
23 to him while he was seated in the back of a police car, and the
24 suspects were taken into the street about two houses away. (4 RT
25 2162-2170; 5 RT 2417, 2421). Robles testified that he immediately
26 excluded the others as possible suspects, and he identified
27 Petitioner and Sanchez. (CT 19-20).

1 Officer Merida, who was present for the identification,
2 testified that there were five other people in the house, aside
3 from Petitioner and Sanchez. (CT 45). Field interview cards were
4 created for all of them, but the officers did not know what happened
5 to the cards. (CT 45-46; 5 RT 2461, 2507-2508). The police report
6 did not list these five other witnesses, and they were not residents
7 of the house. (5 RT 2467-2468). Officer Merida testified that
8 Petitioner, Sanchez, and "one or two" others were shown to the
9 victim as possible suspects, and the victim identified Petitioner
10 and Sanchez as the perpetrators. (CT 46-47).

11
12 Petitioner has failed to show that there would have been any
13 merit to a motion to suppress the identification based on missing
14 evidence. To the contrary, the California Court of Appeal
15 reasonably concluded that there was no Brady or Trombetta violation
16 to warrant excluding the identification. A Brady violation occurs
17 when the prosecution withholds evidence that is material and
18 "favorable to the accused, either because it is exculpatory, or
19 because it is impeaching." Banks v. Dretke, 540 U.S. 668, 691
20 (2004); see Brady v. Maryland, 373 U.S. 83 (1963). Brady is
21 inapplicable here because the evidence at issue was lost by the
22 officers, not suppressed by the prosecution, and its loss left a
23 court no way to ascertain whether it was material or favorable to
24 Petitioner. Trombetta, on the other hand, applies to lost
25 evidence, but a Trombetta violation occurs only when the lost or
26 destroyed evidence "possess[es] an exculpatory value that was
27 apparent before the evidence was [lost or] destroyed, and [is] of
28 such a nature that the defendant would be unable to obtain

1 comparable evidence by other reasonably available means."
2 California v. Trombetta, 467 U.S. 479, 489 (1984); United States
3 v. Bingham, 653 F.3d 983, 994 (9th Cir. 2011). Moreover, the
4 failure to preserve such evidence violates due process only if the
5 criminal defendant "can show bad faith on the part of the police."
6 Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Mere negligence
7 does not suffice. Id.; Grisby v. Blodgett, 130 F.3d 365, 371 (9th
8 Cir. 1997); see also United States v. Flyer, 633 F.3d 911, 916 (9th
9 Cir. 2011) ("Bad faith requires more than mere negligence or
10 recklessness."). Here, there is nothing in the record to suggest
11 any missing evidence regarding the field identification would have
12 had apparent exculpatory value, or that the loss of such evidence
13 was the result of bad faith.

14
15 Because a motion to suppress the field identification would
16 have been meritless, Petitioner's trial counsel was not ineffective
17 in failing to make such a motion. See Petrocelli v. Baker, 869
18 F.3d 710, 723 (9th Cir. 2017) ("A failure to make a motion to
19 suppress that is unlikely to succeed generally does not constitute
20 ineffective assistance of counsel."); Zapien v. Martel, 849 F.3d
21 787, 796 (9th Cir. 2016) (petitioner did not receive ineffective
22 assistance of counsel when "[c]ompetent counsel could reasonably
23 have concluded that moving to exclude [evidence] on the grounds
24 Zapien now suggests would have seemed frivolous"); see also Premo
25 v. Moore, 562 U.S. 115, 124 (2011) ("[T]he first and independent
26 explanation - that suppression would have been futile - confirms
27 that [trial counsel's] representation was adequate under
28 Strickland, or at least that it would have been reasonable for the

1 state court to reach that conclusion."). Accordingly, the
2 California Court of Appeal's determination that trial counsel was
3 not ineffective by failing to move to suppress the field
4 identification in light of lost evidence was not contrary to, or
5 an unreasonable application of, clearly established federal law.²

6
7
8 ² Although Petitioner does not argue, here, that suppression
9 was warranted also because the field identification was
10 "impermissibly suggestive," that basis would also lack merit. For
11 a witness identification procedure to be "impermissibly
12 suggestive," it must "give rise to a very substantial likelihood
13 of irreparable misidentification." Sexton v. Beaudreaux, 138 S.
14 Ct. 2555, 2559 (2018) (internal quotation and citation omitted).
15 Even then, suppression is not required unless the identification
16 procedure was also unnecessary and otherwise unreliable based on
17 the totality of the circumstances. Perry v. New Hampshire, 565
18 U.S. 228, 239 (2012); People v. Clark, 63 Cal. 4th 522, 556 (2016).
19 The Supreme Court recently noted that it "has held that pretrial
20 identification procedures violated the Due Process Clause only
21 once," in Foster v. California, 394 U.S. 440 (1969). Sexton, 138
22 S. Ct. at 2559. Foster involved "two highly suggestive lineups
23 and 'a one-to-one confrontation,' which 'made it all but inevitable
24 that [the witness] would identify [the defendant].'" Id. (quoting
25 Foster, 394 U.S. at 443).

26 The standard here, on habeas review of a state prisoner's
27 Strickland claim, is even harder to overcome. Indeed, the
28 deference that this Court owes to the California Court of Appeal's
decision is "near its apex in this case, which involves a Strickland
claim based on a motion that turns on general, fact-driven
standards such as suggestiveness and reliability." Id. at 2560.
In this case, the California Court of Appeal concluded that the
field identification procedure was not unduly suggestive in part
because "the police showed Robles more than the number of persons
involved in the crime; the police did not tell or otherwise intimate
to Robles which persons he should select; and Robles did, in fact,
select some suspects and not select others." (Lodgment 8 at 15).
The Court of Appeal thus denied Petitioner's claim that his trial
counsel was ineffective by failing to move to suppress the field
identification due to its suggestiveness. (See id. at 9-16).
Because this Court cannot say that determination was unreasonable,
Petitioner's claim on that basis would fail.

1 **B. Instructional Error (Ground Two)**

2
3 In Ground Two, Petitioner claims that the trial court violated
4 his rights by failing to instruct the jury to begin deliberating
5 anew after an alternate juror was seated. (Petition at 5).
6

7 **1. California Court of Appeal's Opinion**

8
9 The California Court of Appeal rejected Petitioner's claim,
10 stating:
11

12 The parties presented evidence for four days; the
13 jury was instructed on the law and the parties made their
14 closing arguments on the fifth day. The jury began to
15 deliberate at 4:01 p.m. on that fifth day and deliberated
16 for 27 minutes before breaking for the evening. The next
17 morning, the trial court excused one of the jurors and
18 substituted in one of the alternate jurors. When the
19 court did so, the court instructed the jury to "[g]o
20 back to the deliberation room and begin your
21 deliberations." The jury deliberated for 17 minutes
22 prior to lunch and 92 minutes after lunch before reaching
23 its verdicts. [Petitioner] and Sanchez argue that the
24 court's failure to tell the jury that it needed to
25 disregard its deliberations occurring prior to the
26 substitution violated their right to a 12-member jury
27 under the California Constitution. Because this claim
28 turns on the application of law to undisputed facts, our

1 review is de novo. (People v. Christman (2014) 229
2 Cal.App.4th 810, 815.)

3
4 A trial court has the discretion under section 1089
5 to discharge a juror in the midst of deliberations and
6 to have "an alternate ... take a place in the jury box,
7 ... subject to the same rules and regulations as though
8 the alternate juror had been selected as one of the
9 original jurors." To give effect to the California
10 Constitution's guarantee that a criminal jury "shall
11 consist of 12 persons" (Cal. Const., art. I, § 16) and
12 to ensure the jury's verdict is a product of the
13 deliberations of those "12 persons," a court may only
14 exercise its power to substitute in an alternate juror
15 if it "instruct[s] the jury to set aside and disregard
16 all past deliberations and begin deliberating anew."
17 (People v. Collins (1976) 17 Cal. 3d 687, 694, overruled
18 on other grounds in People v. Boyette (2002) 29 Cal.4th
19 381, 462, fn. 19; People v. Renteria (2001) 93
20 Cal.App.4th 552, 558-559 (Renteria); accord, CALCRIM No.
21 3575 [so instructing].) A trial court does not satisfy
22 this requirement by telling the jury to "'resume their
23 deliberations starting over with the new trial juror'"
24 (People v. Martinez (1984) 159 Cal.App.3d 661, 665
25 (Martinez), italics omitted); by telling the jury to
26 start its deliberations "'from scratch so that [the
27 alternate juror] has full benefit of everything that has
28 gone on ... up to the present time'" (People v. Odle

1 (1988) 45 Cal. 3d 386, 405); or by implicitly treating
2 the prior jury's deliberations as effective by
3 responding to the prior jury's request for a readback of
4 testimony (People v. Guillen (2014) 227 Cal.App.4th 934,
5 1030 (Guillen)).

6
7 Under these standards, the trial court's
8 instruction in this case was deficient. The court told
9 the jury to "begin [its] deliberations," but the jury
10 had by that point already been in deliberations for 27
11 minutes. To be sure, as we discuss below, it is far from
12 clear that the jury in that brief time did more than
13 discharge its first duty to select a foreperson. But the
14 jury had met to deliberate, and the trial court's failure
15 to instruct the jury to "disregard" any prior
16 deliberations was error. (Accord, Martinez, supra, 159
17 Cal.App.3d at p. 665.)

18
19 This error, however, does not always mandate
20 reversal. (Renteria, supra, 93 Cal.App.4th at p. 559.)
21 Instead, reversal is required only if it is reasonably
22 probable that a "more favorable verdict would have been
23 returned had the jury been properly instructed following
24 the substitution." (Martinez, supra, 159 Cal.App.3d at
25 p. 665, citing People v. Watson (1956) 46 Cal.2d 818,
26 836.) In assessing whether such a reasonable probability
27 exists in this context, courts look to (1) "'whether the
28 case is a close one,'" and (2) a "'compar[ison of] the

1 time the jury spent deliberating before and after the
2 substitution of the alternate juror.'" (People v.
3 Proctor (1992) 4 Cal.4th 499, 537.) The two factors
4 interact: Where a jury has convened for a sufficient
5 period of time prior to the substitution for it to have
6 deliberated on the merits and where it is a close case,
7 courts have concluded that a different result is
8 reasonably probable. (Renteria, at pp. 560-561 [jury
9 deliberates for "some hours" prior to substitution,
10 deliberates for "30 minutes" afterwards, and the case is
11 "close"; reversal warranted]; Martinez, at pp. 665-666
12 [jury deliberates for two and one-quarter hours prior to
13 substitution, deliberates for six days afterwards, and
14 the case is "close"; reversal warranted].) Where the
15 case is not close or the pre-substitution deliberations
16 are "minimal," courts have declined to hold that a
17 different result is reasonably probable. (Proctor, at
18 pp. 536-538 [jury deliberates for less than an hour prior
19 to substitution, deliberates for two and one-half days
20 afterwards, and "strong evidence" against the defendant;
21 reversal not warranted]; Guillen, supra, 227 Cal.App.4th
22 at pp. 1031-1032 [jury deliberates briefly prior to
23 substitution, deliberates nine days afterwards, and
24 strong evidence on lesser included offense on which
25 guilty verdict was returned; reversal not warranted].)

26
27 Applying these factors, we conclude a different
28 verdict is not reasonably probable in this case. As we

1 discuss below when assessing the sufficiency of the
2 evidence, the evidence in this case is far from
3 overwhelming, but this is also not a "close case." More
4 importantly, the jury in this case only met for 27
5 minutes prior to the substitution; this is a "minimal"
6 amount of time, not enough for the jury to engage in any
7 meaningful deliberation on the merits that it would need
8 to be told to disregard. What is more, the jury then
9 took a far greater amount of time - indeed, four times
10 as long as its pre-substitution meeting - to deliberate
11 once the alternate juror joined the jury. On these facts,
12 the instructional error does not warrant reversal.

13
14 (Lodgment No. 8 at 6-9)

15 16 **2. Analysis**

17
18 Because habeas relief under § 2254 is available only for
19 violations of clearly established federal law, challenges to jury
20 instructions in state trials generally do not warrant federal
21 habeas relief. See Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th
22 Cir. 1983); Hernandez v. McGrath, 595 F. Supp. 2d 1111, 1141 (E.D.
23 Cal. 2009) ("Failure to give an instruction which might be proper
24 as a matter of state law does not amount to a federal constitutional
25 violation."). Instructional error warrants federal habeas relief
26 only if the "instruction by itself so infected the entire trial
27 that the resulting conviction violates due process." Waddington
28 v. Sarausad, 555 U.S. 179, 191 (2009) (citation and internal

1 quotation marks omitted); Middleton v. McNeil, 541 U.S. 433, 437
2 (2004) (per curiam); Estelle v. McGuire, 502 U.S. 62, 72 (1991);
3 Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988). A
4 petitioner challenging the failure to give an instruction bears an
5 "especially heavy" burden because "[a]n omission, or an incomplete
6 instruction, is less likely to be prejudicial than a misstatement
7 of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977);
8 Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997); Hendrix
9 v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992). Whether a
10 constitutional violation occurred must be evaluated in the context
11 of the instructions as a whole and the entire trial record
12 (including the arguments of counsel). Estelle, 502 U.S. at 72;
13 Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995). Moreover,
14 if a constitutional error occurred, federal habeas relief remains
15 unwarranted unless the error caused prejudice, i.e., unless it had
16 a substantial and injurious effect or influence in determining the
17 jury's verdict. Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per
18 curiam) (citing Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)).

19
20 Here, Petitioner seeks relief due to the trial court's failure
21 to instruct the jury to begin deliberations anew after it
22 substituted an alternate juror. However, there is no clearly
23 established constitutional right to such an instruction. See Tate
24 v. Bock, 271 F. App'x 520, 523 (6th Cir. 2008) (finding no Supreme
25 Court authority that "clearly establishes a constitutional right
26 to have the jury instructed to deliberate anew after an alternate
27 is empaneled"); Peek v. Kemp, 784 F.2d 1479, 1485 (11th Cir. 1986)
28 (petitioner suffered no constitutional deprivation of his

1 constitutional rights when the trial court substituted a juror
2 without instructing the jury to begin its deliberations anew);
3 United States v. Evans, 635 F.2d 1124, 1128 (4th Cir. 1980)
4 (rejecting defendant's contention that his rights were violated
5 due to the trial court's failure to specifically instruct the jury
6 to begin deliberations anew after addition of alternate juror
7 because "[n]othing precluded the jury from starting from the very
8 beginning all over again," and "[t]he speculative assertion of
9 prejudice from the unexceptional instruction, to which no objection
10 was raised, was insufficient to justify reversal"); Ortega v.
11 Seibel, 2017 WL 3033421, at *15 (C.D. Cal. July 12, 2017) (noting
12 that federal courts in this and other circuits have indicated that
13 there is no constitutional requirement to instruct a jury to begin
14 deliberations anew upon seating an alternate juror (citing cases));
15 Hernandez v. McGrath, 595 F. Supp. 2d 1111, 1141 (E.D. Cal. 2009)
16 (finding no Supreme Court authority requiring that a specific
17 instruction be given to the jury after an alternate has been
18 substituted for a deliberating juror); Hernandez v. Jacquez, 2011
19 WL 1155465, at *6 (C.D. Cal. Feb. 22, 2011) (same); Venegas v.
20 Uribe, 2011 WL 4104693, at *7 (C.D. Cal. July 29, 2011) (same);
21 Baca v. Scribner, 2008 WL 850309, at *6 (E.D. Cal. Mar. 28, 2008)
22 (same). Thus, regardless of whether it was error under California
23 law, the trial court's failure to provide the instruction did not
24 violate Petitioner's clearly established constitutional rights.

25
26 Furthermore, the California Court of Appeal appropriately
27 applied harmless error analysis to this issue. See, e.g., Hedgpeth
28 v. Pulido, 555 U.S. 57 (2008) (instructional errors that do not

1 "categorically 'vitiat[e] all the jury's findings'" are subject to
2 harmless error analysis); Clark v. Brown, 450 F.3d 898, 904 (9th
3 Cir. 2006) (instructional error is subject to harmless error
4 analysis). The California Court of Appeal found no prejudice in
5 the trial court's failure to instruct the jury to begin
6 deliberations anew after substituting a juror, particularly because
7 the jury had met for only twenty-seven minutes prior to the
8 substitution, and they deliberated for "four times as long" after.
9 (Lodgment 8 at 9). As the Court of Appeal pointed out, the twenty-
10 seven minutes of pre-substitution deliberation was "a 'minimal'
11 amount of time, not enough for the jury to engage in any meaningful
12 deliberation on the merits that it would need to be told to
13 disregard." (Id.). The Court cannot say that the Court of Appeal's
14 finding of no prejudice was objectively unreasonable. See Ortega
15 v. Seibel, No. 2017 WL 033421, at *16 (C.D. Cal. July 12, 2017)
16 (no prejudice in state trial court's failure to instruct jury to
17 begin deliberations anew with alternate juror in part because "the
18 jury spent less time deliberating before the substitution – for 1
19 hour and 15 minutes – than after the substitution – for 1 hour and
20 40 minutes," which "indicates that the alternate juror fully
21 participated in the deliberations leading to the verdicts");
22 Hernandez v. Jacquez, 2011 WL 1155465, at *8 (C.D. Cal. Feb. 22,
23 2011) (fact that jury spent nearly same amount of time deliberating
24 both before and after substitution "supports the conclusion that
25 petitioner was not prejudiced by the trial court's failure to
26 instruct the jury to begin deliberations anew"); Baca v. Scribner,
27 2008 WL 850309, at *6 (E.D. Cal. Mar. 28, 2008) (no prejudice in
28 state court's failure to instruct jury to begin deliberations anew

1 when alternate juror was seated after less than three hours of
2 deliberation, and jury proceeded to deliberate for seven days with
3 alternate juror before reaching verdict).

4
5 Accordingly, the California Supreme Court's rejection of
6 Petitioner's Ground Two was not contrary to, or an unreasonable
7 application of, clearly established federal law.

8
9 **VII. ORDER**

10
11 For the reasons stated above, IT IS ORDERED that the Petition
12 for Writ of Habeas Corpus is denied and this action is dismissed
13 with prejudice.

14
15 DATED: January 15, 2019.

16
17 /s/
18 ALKA SAGAR
19 UNITED STATES MAGISTRATE JUDGE
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